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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

Wexford Associates, Inc., *et al.*, *Petitioners*

v.

George Atkisson, *et al.*, *Respondents*

Petition for a Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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October 1994

56 pp

QUESTION PRESENTED

Whether in an appeal of a civil case, the Supreme Court of Virginia's reversal of a ruling of the trial court recited in two of the trial court's written opinions is in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution when no error was assigned to the ruling, notwithstanding that the Rules and several decades of case law of the Supreme Court of Virginia specify that a ruling of a trial court will not be reviewed on appeal unless error has been assigned to the ruling by the appellant or an appellee.

PARTIES TO THE APPEAL TO THE VIRGINIA SUPREME COURT

Appellant: Fairfax County Park Authority

Appellees: George Atkisson
Carlotta T. Atkisson
Wexford Associates, Inc.
James E. Henry
Susan H. Henry
Herbert Vogel
Barbara Vogel
John Kowalczyk (deceased)
Katherine Kowalczyk
Patrick G. Deasy
Jane M. Deasy
Charles E. Andrews
Jean S. Andrews
Brian T. McVay
Elizabeth J. McVay
M. Jack Wilkenfeld
Joanne Wilkenfeld
Walter T. Morgan
Beth A. Morgan
Lawrence W. Wyte
Diane B. Wyte

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IN THE SUPREME COURT OF THE UNITED STATES
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Wexford Associates, Inc., *et al.*, *Petitioners*

v.

George Atkisson, Carlotta T. Atkisson, and Fairfax County Park Authority, *Respondents.*

Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

Wexford Associates, Inc., James E. Henry, Susan H. Henry, Herbert Vogel, Barbara Vogel, John Kowalczyk (deceased), Katherine Kowalczyk, Patrick G. Deasy, Jane M. Deasy, Charles E. Andrews, Jean S. Andrews, Brian T. McVay, Elizabeth J. McVay, M. Jack Wilkenfeld, Joanne Wilkenfeld, Walter T. Morgan, Beth A. Morgan, Lawrence W. Wyte, and Diane B. Wyte respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (App., *infra*, 1a-8a) is reported at 248 Va. 142 and 445 S.E.2d 101. The opinions of the Circuit Court of Fairfax County (App., *infra*, 17a-23a) are unreported.

JURISDICTION

The Supreme Court of Virginia issued its opinion on June 10, 1994 (App., *infra*, 1a). A Petition for Rehearing was timely filed with the Virginia Supreme Court on July 9, 1994, by Wexford Associates, Inc., and the individual defendants other than George Atkisson and Carlotta T. Atkisson. The Petition for Rehearing was denied by order issued by the Clerk of the Supreme Court of Virginia on August 1, 1994 (App., *infra*, 24a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

Amendment XIV, § 1, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules of the Supreme Court of Virginia

Rule 5:17. Petition for Appeal.

(a) *Time for Filing.* – In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the clerk of this Court:

(1) in the case of an appeal from a trial court, not more than three months after entry of the order appealed from; . . . .

. . . .

(c) *Form and Content.* – Under a separate heading entitled "Assignments of Error," the petition shall list the specific errors in the rulings below upon which the appellant intends to rely. Only errors assigned in the petition for appeal will be noticed by the Court. Where appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to questions presented in, or to actions taken by, the Court of Appeals may be included in the petition for appeal to this Court. An assignment of error which merely states that the judgment or award is contrary to the law and the evidence is not sufficient. If the petition for appeal does not contain assignments of error, the appeal will be dismissed.

Under another separate heading entitled "Questions Presented," the petition shall list the questions upon which the appellant intends to submit argument, with a clear and exact reference to the particular assignment of error to which each question relates.

. . . .

The petition also shall contain:

. . . .

(2) A brief statement of the nature of the case and of the material proceedings in the trial court or commission in which the case originated. This statement shall omit references to any paper filed or action taken that does not relate to the assignments of error.

(3) A clear and concise statement of the facts that relate to the assignments of error, with references to the pages of the record, when there is any possibility that the appellee may question the statement.

(4) The principles of law, the argument, and the authorities relating to each assignment of error. With respect to each assignment of error, the principles, the argument, and the

authorities shall be stated in one place and not scattered through the petition. At the option of counsel, the argument may be preceded by a brief summary.

Rule 5:18. Brief in Opposition.

(a) *Filing Time.* – A brief in opposition to granting the appeal may be filed with the clerk of this Court by the appellee within 21 days after petition for appeal is served on counsel for the appellee.

(b) *Form and Content.* – The brief in opposition shall conform in all respects to the requirements of the brief of appellee (Rule 5:28). The brief in opposition may include assignments of cross-error and, except in cases of appeals of right to this Court, no cross-error not then assigned will be noticed by this Court.

Rule 5:27. Opening Brief of Appellant.

The form and contents of the opening brief of appellant shall conform in all respects to the requirements of the petition for appeal set forth in Rule 5:17 (c), except that references shall be to the pages of the appendix rather than the pages of the record.

Rule 5:28. Brief of Appellee.

The brief of appellee shall contain:

. . . .

(b) A statement of the case and of the questions presented if the appellee disagrees with the statement or questions presented by the appellant. If the appellee believes that any question presented by the appellant is unrelated to an assignment of error, he shall so state. In an appeal of right to

this Court from an order disciplining, suspending, or disbarring an attorney at law, the Virginia State Bar may include assignments of cross-error. In such cases, no cross-error not then assigned will be noticed by the Court.

. . . .

(d) The principles of law, the argument, and the authorities relating to each question presented. With respect to each question, the principles, the argument, and the authorities shall be stated in one place and not scattered through the brief. At the option counsel, the argument may be preceded by a brief summary.

(e) With respect to the assignments of cross-error, if any:

(1) A statement of the question presented with a clear and exact reference to the particular assignment of cross-error to which each question relates.

(2) The principles of law, the argument and the authorities relating to each question presented. With respect to each such question, the argument and the authorities shall be stated in one place and not scattered through the brief.

(3) A statement of the precise relief sought.

STATEMENT

On July 18, 1986, George and Carlotta T. Atkisson ("Atkisson" or Atkissons") filed a Bill of Complaint for injunctive relief and damages in the Circuit Court of Fairfax County, Virginia, against several defendants, including Wexford Associates, Inc. ("Wexford"), certain individual lot owners ("Individual Defendants") (which included the individual Petitioners) within Section Three Wendover Subdivision ("Wendover"), and the Fairfax County Park Authority ("Park Authority"). The suit involved the Atkissons' contention that the defendants had deprived them of access to an old family

cemetery by way of an alleged easement running through Wendover and Park Authority property which the Atkissons sought to have recognized by the court and reestablished by the defendants. The Atkissons alleged that Mr. Atkisson's ancestors had been deeded an express easement leading to the cemetery which was reflected in the land records.

A. Trial Court Proceedings

The case was tried on July 30, 31, and August 20, 1991, in the Fairfax County Circuit Court (trial court) before the Honorable Thomas A. Fortkort, sitting without a jury. The trial court ruled that there were no damages for the temporary loss of use of the easement. However, the trial court ruled for the Atkissons on two other issues, i.e., that they had an express easement and that they had an identical prescriptive easement. Issues involving the extent of injunctive relief and which parties might pay to reestablish the easement were left for a subsequent hearing.

The trial court granted Atkissons' post-trial motion to conduct a survey to locate the easement and on February 27, 1992, took evidence on the location and conducted an on-site view. On July 15, 1992, the trial court issued a letter opinion ruling that injunctive relief in the form of removing the Wendover subdivision obstructions was not a viable remedy (App., *infra*, 18a) and directing the parties to schedule an evidentiary hearing to establish the value of the easement and viable alternative easements.

After a hearing on January 7, 1993, the trial court issued a second letter opinion, dated February 9, 1993, stating "that removal of the easement obstructions would be grossly inequitable." (App., *infra*, 20a) The letter further stated that the Individual Defendants whose lots obstruct the easement should pay nominal damages of $100.00 per lot to the Atkissons and that Wexford should pay $10,000.00 in punitive damages

to the Atkissons. The trial court also ordered Park Authority, at its own expense, to create a new easement route to the cemetery for the Atkissons exclusively over Park Authority land to allow access by an ordinary vehicle. *Id.* at 23a. A Final Order setting forth the decisions of the trial court was entered on March 10, 1993. (App., *infra*, 9a).

B. Appeal to Virginia Supreme Court

The Virginia Supreme Court awarded Park Authority an appeal from the judgment of the trial court. Neither the Atkissons nor Wexford and Individual Defendants filed cross-error in the appeal of Park Authority. The Atkissons petitioned the Virginia Supreme Court to grant them an appeal, but it was denied because it contained no assignments or error. Wexford and Individual Defendants filed no appeal.

In its appeal Park Authority asked for no relief against Wexford and Individual Defendants. Rather, Park Authority asked that the relief against it in favor of the Atkissons be reversed. Park Authority's appeal was premised on the grounds that Atkissons had not proven they were entitled to any easement right, and that even if they had proven a right to an easement, the trial court had no power to order that Park Authority provide a new easement route that ran exclusively through Park Authority land. As required by the Rules of the Supreme Court of Virginia, Park Authority's Petition for Appeal which was granted by the Supreme Court of Virginia contained assignments of error. Park Authority's three assignments of error were set forth by Park Authority as follows:

ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered that an alternate easement to the cemetery, created out

of "whole cloth" on Park Authority land, be provided since such relief is without foundation in Virginia law or equity and necessarily would create a new servient estate on property where none previously existed.

2. The trial court erred in ruling that the Atkissons owned an express appurtenant easement since they failed to establish an ownership interest in the property to which the easement is appurtenant, which is a prerequisite for enjoyment of an appurtenant easement.

3. The trial court erred when it concluded that the Atkissons have a prescriptive easement since, until the dominant estate was sold in 1978, use of the easement by the Atkissons was by permission and there was no evidence to establish the elements of prescription to override the presumption of passage by permission.

All questions presented listed by the parties directly concerned Park Authority's assignments of error. The Virginia Supreme Court decided the second assignment of error in favor of Appellees George and Carlotta T. Atkisson, thereby upholding the trial court's finding of an express easement in favor of the Atkissons. (App., *infra*, 4a). This obviated any need to rule on the third assignment of error, which was not mentioned in the Court's opinion. The opinion then analyzed the trial court's order that Park Authority relocate the easement route exclusively through its own property, which was the subject of the first assignment of error. *Id.* at 6a-7a. The Court decided that the trial court did not have the authority to relocate the express easement route. *Id.* at 7a.

The foregoing holdings of the Virginia Supreme Court addressed the assignments of error submitted in Park Authority's appeal which are quoted above. However, Section

III of the opinion remands the case to the trial court for entry of an order providing for an easement route agreed upon by the lot owners, Wexford Associates, and the Atkissons. Alternatively, if the litigants cannot agree, "obstructions that interfere with Atkisson's use of the express easement" are to be removed. App., *infra*, 7a-8a.

C. How the Federal Questions Were Presented

On June 17, 1994, Wexford Associates, Inc., and Individual Defendants timely filed their Notice of Intention to Apply for a Rehearing of the decision by the Virginia Supreme Court announced by the opinion of June 10, 1994. On July 19, 1994, Wexford Associates, Inc., and Individual Defendants timely filed a Petition for Rehearing with the Virginia Supreme Court. The Petition for Rehearing objected to Section III of the opinion, which remands the case to the trial court for entry of an order establishing an easement route agreed to by the parties, or, if the parties cannot agree, removal of the obstructions that interfere with Atkissons' use of the express easement. The Petition for Rehearing argued that these "directions" by the Virginia Supreme Court amounted to reversal of the trial court's ruling, stated in both of the trial court's written letter opinions, that the re-establishment of the easement route alleged by the Atkissons would not be ordered. The two opinion letters were incorporated by reference in the trial court's Final Order. (App., *infra*, 10a.) No party assigned any error to the trial court's ruling that the alleged easement route would not be ordered.

The Petition for Rehearing cited Virginia Supreme Court Rules and case law which established that no error not assigned in an appellant's petition or appellee's brief would be considered by the Virginia Supreme Court. The Petition for Rehearing argued that not abiding by the Rules of the Virginia Supreme Court and case law regarding review of errors for

which there was no assignment of error was a violation of Petitioners' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United Sates Constitution, stating as follows:

> Parties to appeals are repeatedly enjoined by the Rules of Court to limit their discussion in briefs to matters relating to assignment of error. Rules 5:17(c), 5:18(b), 5:27, 5:28. The Rules of Court providing that only error assigned will be noticed are for the purpose of informing the Court and the parties what matters are in issue on appeal. *Harlow*, 195 Va. at 271-72, 77 S.E.2d at 853. This provides the parties with notice of what issues they must address to protect their interests. The reversal of the chancellor's ruling that the easement route claimed by Atkissons would not be re-established was a matter the parties were precluded from addressing to the Court.
>
> The Court has, by its Rules and precedent, particularized what is due process in the appeal process. Review and decision regarding matters which this Court has by Rules and substantial precedent said will not be considered in effect excludes the parties from participating in the proceeding with respect to those matters. The exclusion results in lack of notice and, consequently, lack of an opportunity to be heard. This amounts to denial of due process. *Walt Robbins, Inc.*, 232 Va. at 47, 348 S.E.2d 226; *Burts v. Burts*, 227 Va. 618, 620, 316 S.E.2d 745, 746 (1984); *Moore v. Smith*, 177 Va. 621, 626, 15 S.E.2d 48, 49 (1941). It is thereby a violation of the Due Process Clauses of the Virginia and Federal Constitutions. Const. Art. 1, §11; U.S.C.A. Const. Amend. 14, §1. Affording relief to the Atkissons,

> which this Court's own Rules and precedent declare may not be considered, is variation in the application of the law which is in violation of the Equal Protection Clause of the United States Constitution. *Cf., Lindsey v. Normet*, 92 S.Ct. 862, 405 U.S. 56, 31 L.Ed.2d 36 (1972); *Williams v. Oklahoma City*, 89 S.Ct. 1818, 395 U.S. 458, 23 L.Ed.2d 440 (1969).

Pages 6-7, Petition for Rehearing by Wexford Associates, Inc., and Individual Defendants. This was the first time the federal questions sought to be reviewed could have been addressed because the federal questions unexpectedly arose due to the "directions" set forth in Section III of the Virginia Supreme Court's June 10, 1994, opinion. No rationale was stated in the Court's opinion for the "directions" given which effectively reversed the trial court's ruling that the easement route would not be reestablished.

REASONS FOR GRANTING THE PETITION

This Court has emphasized the importance of the procedural component of the Due Process Clause. *Honda Motor Co., Ltd. v. Oberg*, 114 S.Ct. 2331, 2335 (1994) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993)). The departure of the Virginia Supreme Court from its own appellate rules and well-established case law regarding the necessity of assignment of error as a precondition to review of a trial court ruling has deprived Petitioners of fundamental rights accorded by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It is particularly important for this Court to address such deprivation of Constitutional rights by state appeal courts of last resort to prevent erosion of the rightful expectation of litigants in every

jurisdiction subject to our Constitution to justice administered in accordance with due process and equal protection of the law.

I. Assignment of Error to Ruling of Trial Court Required for Review of the Ruling by Virginia Supreme Court.

Park Authority had to file a petition for appeal to obtain review of the trial court's judgment by the Supreme Court of Virginia. Va. Sup. Ct. R. 5:17(a). The petition had to contain under a separate heading "Assignments of Error" which list the specific errors by the trial court which the appellant intends to assert. Va. Sup. Ct. R. 5:17(c). The second sentence of Rule 5:17(c) states that "only errors assigned in the petition for appeal will be noticed by this Court [Supreme Court of Virginia]. The second paragraph of Rule 15:17(c) requires appellant to list in the petition "Questions Presented" which relate to the assignment(s) of error. The petition must also contain a statement of the nature of the case which omits references to any paper filed or action taken that does not relate to the assignments of error, and the principles of law, the argument, and the authorities that relate to the assignments of error. Va. Sup. Ct. R. 5:17(c), subparagraphs (2), (3), and (4) of the fourth paragraph. The foregoing rules make the assignments of error the focal point of a petition for appeal. In sum, there is no provision for anything in the petition which does not pertain to an assignment of error, and the Virginia Supreme Court will only deal with error asserted in an assignment of error. Rule 5:27 requires that the opening brief of appellant meet the same requirements for the petition for appeal imposed by Rule 5:17(c).

The Rules of the Supreme Court of Virginia which contain directions regarding the content of a brief in opposition to a petition and brief of appellee in opposition to appellant's

opening brief mandate the same focus on assignments of error by appellant and appellee. Rule 5:18 specifies that any brief in opposition to a petition shall conform to the requirements of the brief of appellee contained in Rule 5:28. It also specifies that if an appellee wishes to have any error appellee asserts considered by the Virginia Supreme Court, the appellee must assign error in the brief in opposition to the petition. Rule 5:28 requires that, if an appellee's brief contains cross-error, the brief contain questions(s) presented which relate to the cross-error and set forth the principles of law, the argument and the authorities which relate to each question presented.

The Supreme Court of Virginia has regularly and consistently enforced its rules requiring timely assignment of error in order for a ruling of a trial court to be reviewed by it. *Fairfax Hospital System, Inc. v. McCarty*, 244 Va. 28, 37 n.*, 419 S.E.2d 621, 626 n.* (1992); *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 49, 348 S.E.2d 223, 228 (1986); *Maynard Constr. Co. v. Driver*, 230 Va. 79, 83, 334 S.E.2d 567, 570 (1985); *Hill v. Hill*, 227 Va. 569, 578, 318 S.E.2d 292, 297 (1984); *DeChene v. Smallwood*, 226 Va. 475, 481 n.2, 311 S.E.2d 749, 752 n.2 (1984); *Brown v. Tazewell County Water & Sewerage Auth.*, 226 Va. 125, 128 n.*, 306 S.E.2d 889, 890 n.* (1983); *Community Motor Bus Co. v. Windley*, 224 Va. 687, 689 n.*, 299 S.E.2d 367, 369 n.* (1983); *Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139, 1140 n.1, 277 S.E.2d 228, 229 n.1 (1981); *Commonwealth, Dept. of Mental Health & Mental Retardation v. Sheriff of Nottoway County*, 221 Va. 306, 311 n.2, 269 S.E.2d 815, 818 n.2 (1980); *Lane v. Scott*, 220 Va. 578, 583, 260 S.E.2d 238, 241 (1979); *Dudley v. Estate Life Ins. Co. of America*, 220 Va. 343, 348, 257 S.E.2d 871, 874 (1979); *Virginia ABC Bd. v. 1713 Wilson, Inc.*, 217 Va. 632, 636, 231 S.E.2d 327, 330

(1977); *Harlow v. Commonwealth*, 195 Va. 269, 274, 77 S.E.2d 851, 854 (1953); *Wood v. Quillin*, 167 Va. 255, 262, 188 S.E. 216, 219 (1936).

II. The Virginia Supreme Court's "Direction" to Re-establish the Claimed Easement Route Reverses a Ruling of the Trial Court without Error Having Been Assigned to the Trial Court's Ruling in Contravention of Virginia Supreme Court Rules and Case Law.

The Atkisson's requested in their suit that the route of the alleged express easement be reestablished. After an on-site view, the chancellor emphatically refused this request twice in two separate letter opinions, saying that the conclusion was "inescapable" that "removal of obstructions is not a viable remedy" (App., *infra*, 18a), and that "removal of the easement obstructions would be grossly inequitable" (App., *infra*, 20a). These two opinion letters were incorporated by reference in the chancellor's Final Order. App., *infra*, 10a. No party assigned any error with respect to these rulings or their entry by the Final Order.

The trial court's unappealed rulings that the claimed easement route would not be reestablished became law of the case. *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 49, 348 S.E.2d 223, 228 (1986); *Community Motor Bus Co. v. Windley*, 224 Va. 687, 689, 299 S.E.2d 367, 369 (1983); *Wood v. Quillin*, 167 Va. 255, 262, 188 S.E. 216, 219 (1936). The reversal of this ruling by Section III of the Virginia Supreme Court's June 10, 1994, opinion is in conflict with the Rules of the Virginia Supreme Court and consistent precedent cited above in Section I of these Reasons, because no error was assigned to the trial court's rulings that the claimed easement route would not be reestablished. The timely assignment of

error as a precondition for consideration of an issue determined in a trial court has been described by the Virginia Supreme Court as jurisdictional. *DeChene v. Smallwood*, 226 Va. 475, 481, 311 S.E.2d 749, 752 (1984). The Virginia Supreme Court has also held that when there was no assignment of error to a ruling it became law of the case and binding on it, irrespective of the correctness of the ruling. *Wood*, 167 Va. at 262, 188 S.E. at 219.

III. The Virginia Supreme Court's Review and Reversal of the Trial Court's Ruling To Which Error Was Not Assigned Is in Violation of the Due Process Clause of the Fourteenth Amendment.

A pleading which begins a suit must properly give notice to an adversary of the nature of the cause of action being pursued and no other theory may be used to support a judgment. *City of Norfolk v. Vaden*, 237 Va. 40, 44, 375 S.E.2d 730, 731-32 (1989); *Ted Lansing Supply Co. v. Aluminium & Constr. Corp.*, 221 Va. 1139, 277 S.E.2d 228 (1981). The assignment of errors in the appeal to the Virginia Supreme Court serves the same function as the allegations made in a suit filed with the trial court. The appellate court and the the parties are thereby informed of the error the appellant intends to address and discussion on the appellate level is limited to those errors. The purpose and effect of the assignment of error was summarized by the Virginia Supreme Court in *Harlow v. Commonwealth*, 195 Va. 269, 77 S.E.2d 851 (1953) as follows:

> The purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which appellant intends to ask a reversal of the judgment, and to limit discussion to these points.

> Without such assignments, appellee would be unable to prepare an effective brief in opposition to the granting of an appeal, to determine the material portions of the record to designate for printing, to assure himself of the correctness of the record while it is in the clerk's office, or to file, in civil cases, assignments of cross-error.

Id. at 271-72, 77 S.E.2d at 853.

Reversal of the trial court's ruling that the easement route claimed by Atkissons would not be reestablished was a matter the parties to the appeal were precluded from addressing to the Virginia Supreme Court by reason of Virginia Supreme Court Rules and case law discussed in Section I of these Reasons. When the Virginia Supreme Court ordered reestablishment of the easement route claimed by the Atkissons unless the parties could agree to some other route, Wexford and Individual Defendants were deprived of notice that the matter of reestablishment of the easement route was in issue on appeal and deprived of an opportunity to be heard on the issue. This was a violation of the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1.

This Court has held that notice and an opportunity to be heard are fundamental to the notion of due process. *Holmes v. Conway,* 241 U.S. 624, 631-32 (1916); *American Land Co. v. Zeiss,* 219 U.S. 47, 71 (1911). Similar comment has been made in the lower federal courts. E.g., *Davis v. Lane,* 814 F.2d 397, 402 (7th Cir. 1987).The Virginia Supreme Court has also pointed out this basic principle. *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 47, 348 S.E.2d 223, 226 (1986); *Burts v. Burts,* 227 Va 618, 620, 316 S.E.2d 745, 746 (1984); *Moore v. Smith,* 177 Va. 621, 626, 15 S.E.2d 48, 49 (1941).

Due process requires that the opportunity to be heard be at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545 (1965) (natural father receiving notice only after decree entered allowing adoption of his child was not accorded due process when subsequent hearing to set aside decree placed heavier burden on natural father than original proceeding would have). Addressing an issue for the first time in a Petition for Rehearing to the Supreme Court of Virginia after an opinion has been issued is not a meaningful time nor a meaningful manner for first addressing an issue because the Virginia Supreme Court is for all practical purposes not willing to grant Petitions for Rehearing (see comment of Justice George M. Cochran, App., *infra*, 26a-28a) and without an assignment of error the parties are confronted with the disadvantages described in the quotation above from *Harlow v. Commonwealth*, 195 Va. 269, 77 S.E.2d 851 (1953).

Whatever due process occurred in the trial court on the issue of reestablishment of the easement route claimed by the Atkissons was nullified in the Virginia Supreme Court as the facts set forth in the Statement, *supra*, indicate. This Court should grant this Petition and reverse the denial of Petitioners' due process rights. This case presents an opportunity for this Court to review the limitations on state appeal courts' departure from their own rules and well-established case law to the detriment of parties' due process rights.

IV. The Virginia Supreme Court's Review and Reversal of the Trial Court's Ruling to Which Error Was Not Assigned Is in Violation of the Equal Protection Clause of the Fourteenth Amendment.

Appellate review which has been accorded litigants must be exercised without discrimination. *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43 (1954); *see*

Lindsey v. Normet, 405 U.S. 56 (1972) (double bond prerequisite for appealing arbitrarily discriminates); *Williams v. Oklahoma City*, 395 U.S. 458 (1969) (appeal may not be denied to impoverished petitioner who cannot pay for trial transcript); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (defendant may not be denied appeal because he cannot pay for trial court record).

Section I, *supra*, sets forth how appellees in the Virginia Supreme Court comparatively situated to Petitioners in the instant case were treated pursuant to the Rules of the Supreme Court of Virginia and Virginia case law with respect to the requirement of assignment of error. Section II, *supra*, explains how Petitioners in the instant case were treated differently and not afforded equal protection of the law. This different treatment is a violation of the Equal Protection Clause of the Fourteenth Amendment which should be reversed by this Court. U.S. Const. amend. XIV, § 1; *Blair v. Supreme Court of State of Wyo.*, 671 F.2d 389 (10th Cir. 1982); *Oppenheimer v. Roth*, 468 F.2d 901 (9th Cir. 1972). This case presents an opportunity for this Court to review the limitations on state appeal courts' refusal to apply equally to litigants the protections prescribed by appeal courts' own rules and well-established case law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record

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APPENDIX A

Present: All the Justices

FAIRFAX COUNTY PARK AUTHORITY

v. Record No. 930819 OPINION BY JUSTICE LEROY R. HASSELL
June 10, 1994

GEORGE ATKISSON, ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Thomas A. Fortkort, Judge

This appeal involves legal issues relating to the obstruction of an express easement that provides ingress and egress to a family cemetery.

I.

George B. Atkisson and his wife, Carlotta T. Atkisson, filed their amended bill of complaint against the Fairfax County Park Authority, Wexford Associates, Inc., and 56 owners of lots located in the Wendover Subdivision, Section III, in Fairfax County. The Atkissons alleged that they own a property interest in an easement that provides ingress and egress to their family cemetery and that the defendants had constructed obstructions that interfere with the Atkissons' use of easement. The Atkissons sought a declaration of the existence and extent of their easement and compensatory and punitive damages.

The trial court granted the defendants' demurrer to the amended bill. We awarded the Atkissons an appeal from that judgment, and we reversed the judgment by an unpublished order and remanded the case to the trial court for further pro-

ceedings. Atkisson v. Wexford Associates, Inc., Record No. 890169 (April 26, 1989).

Upon remand, the parties had a trial on the merits. During the trial, the Atkissons nonsuited 38 of the 56 defendants who were lot owners. The case proceeded against the remaining lot owners, Wexford Associates, and the Park Authority.

The chancellor held, among other things, that the Atkissons have an express easement that granted them access to the cemetery. The chancellor established the location of the easement, but decided that he would not grant injunctive relief to the dominant owners because such relief would have required the servient owners to remove improvements such as homes and swimming pools. The chancellor entered a decree requiring that each lot owner, whose lot obstructs the easement, pay $100 to the Atkissons and that Wexford Associates pay the Atkissons $10,000 in punitive damages. Neither the lot owners nor Wexford Associates assigned error to the chancellor's decree. The chancellor also ordered that the Park Authority, at its expense, provide a new easement for the Atkissons on land owned by the Park Authority. We awarded the Park Authority an appeal.

We will state the facts in the light most favorable to the Atkissons, the parties who prevailed in the trial court. In the late 1800s, Mary C. Saunders, Mr. Atkisson's aunt, owned several parcels of land in Fairfax County. She conveyed a 15-acre parcel to Thomas S. Adams, Mr. Atkisson's grandfather, by an 1892 deed. This recorded deed creates an express easement, described as a right-of-way 15 feet wide, over several tracts of land and extending to a public road. The easement allows ingress and egress to the 15-acre parcel.

In 1896, as a result of a decree that had been entered in a partition suit, Mr. Adams received other property referred to as lot No. 2, that adjoined his 15-acre parcel. The cemetery lot is located on either or both of these properties.

Mr. Adams died intestate, and his heirs inherited both properties, including the easement. By a deed dated March 1978, the heirs of Mr. Adams conveyed their interest in the property to Harold O. Miller, trustee.

In 1977, Charles and Audrey Hawthorne acquired a large parcel of property that was burdened with the easement. The Hawthornes initiated proceedings to obtain the necessary permits and zoning amendments so that the property could be subdivided into residential lots. In 1980, Mr. Atkisson appeared before two public hearings of the Fairfax County Board of Supervisors and contested the Hawthorns' proposed subdivision plan because it interfered with the easement that provided access to the cemetery. The Hawthornes "acknowledged" Mr. Atkisson's concerns regarding the easement.

After the property had been rezoned, the Hawthornes conveyed it to Wexford Associates. After the conveyance, Mr. Atkisson contacted J. Stewart Porter, an officer of Wexford Associates, and inquired what Wexford Associates intended to do regarding the easement on the property. Porter informed Mr. Atkisson that he (Porter) would "be in touch with [him]." Later, Mr. Atkisson met with Porter and a surveyor retained by Wexford Associates. Mr. Atkisson showed them the location of the easement on the property. At that time, Mr. Atkisson thought that Wexford Associates would not obstruct the easement.

Wexford Associates subdivided its property into 40 residential building lots and an unimproved parcel. Wexford Associates conveyed the unimproved parcel to the Park Authority. The easement transverses part of the parcel conveyed to the Park Authority . Wexford Associates made no provision in its deed of dedication or in its recorded plat for the easement.

After construction of the subdivision began, Mr. Atkisson contacted Wexford Associates' employees and sent a

letter to Porter inquiring about the easement. Mr. Atkisson also contacted a vice-president of Wexford Associates' title insurance company and retained counsel. Wexford Associates' ignored Mr. Atkisson's concerns, continued to develop the property, and constructed houses and other improvements on the easement. The houses were subsequently conveyed to the lot owners, who are defendants in this litigation.

II.

A.

The Park Authority argues that the Atkissons do not own an express easement because the Atkissons "failed to establish at trial that they owned the dominant estate to which the access easement is appurtenant." The Atkissons argue that they presented evidence from which the chancellor could infer that they had an ownership interest in the cemetery that is a part of the dominant estate. We agree with the Atkissons.

The decree that was entered as a result of the partition suit of 1896 preserved a portion of land for the family cemetery. The partition decree does not contain a metes and bounds description of the cemetery. A factual dispute arose at trial regarding the location of the cemetery. The chancellor made a factual finding that a portion of the cemetery was located on the 15-acre parcel that had been owned by Mr. Adams. The chancellor's factual finding is supported by the testimony of a surveyor who was able to locate certain monuments in the 1892 deed. As mentioned earlier, this 15-acre parcel was the dominant estate that was served by the express easement created in the 1892 deed from Ms. Saunders to Mr. Adams.

The chancellor implicitly found that Mr. Atkisson owned a property interest in the cemetery, and the evidence of record supports the chancellor's finding. David Carr, who was the Atkissons' expert witness, testified that he examined the title to

the property involved in this litigation, and the records show that Mr. Atkisson, as an heir of Mr. Adams, owns an interest in the cemetery lot.

The Park Authority also asserts that the Atkissons do not have an interest in the cemetery because, purportedly, a deed dated March 1978 conveyed the 15-acre parcel and Lot No. 2 to Miller as trustee, who subsequently conveyed his interest in the land without exception to a land development company. This company subsequently conveyed its interest in the property to a partnership that subdivided the land and created a subdivision. The Park Authority asserts that the cemetery is now a part of the newly created subdivision and that the Atkissons do not have an ownership interest in the dominant estate or the appurtenant easement. We disagree.

The 1978 deed states, in relevant part:

> THAT, for and in consideration of the sum of Ten Dollars ($10.00), the receipt of which is hereby acknowledged, the said parties of the first part do hereby grant, bargain, sell and convey unto the party of the second part, in fee simple
>
> except as to existing cemetery,
>
> and with General Warranty of Title,/all of that certain lot or parcel of land, with its improvements and appurtenances thereunto belonging, located in the County of Fairfax, Commonwealth of Virginia, and more particularly described in Attachment A attached hereto and made a part hereof.
>
> . . . .
>
> This conveyance is made subject to any and all easements, restrictions and rights of way of record, and existing cemetery.

Our review of the language contained in the March 1978 deed reveals that the deed did not convey the cemetery to Miller. Rather, in an interlineation, this deed explicitly exempts the cemetery from the property that was conveyed. Furthermore, the restriction contained in the deed makes it clear that the grantors did not convey the cemetery to the trustee.

B.

The chancellor's decree stated in part, that "defendant Fairfax County Park Authority shall, at its own expense, provide an easement across Fairfax County Park Authority land to allow access by the [Atkissons] to the cemetery . . . This easement shall be accessible by an ordinary motor vehicle." The Park Authority states that the chancellor's decree changes the location of the easement located on the servient estate, and also encumbers park Authority property that had never been part of the servient estate. The Park Authority argues that the chancellor lacks the authority to require it to relocate the easement. The Atkissons concur with the Park Authority's argument. Wexford Associates and the lot owners argue, however, that the chancellor's decree is appropriate because it merely requires the relocation of the existing easement.

We agree with the Park Authority. In Eureka Land Co. v. Watts, 119 Va. 506, 89 S.E. 968 (1916), we considered whether an easement may be relocated without the consent of the owners of the dominant and servient estates. J. Allen Watts, owner of a tract of land, conveyed 40 acres to C. O'Leary. The deed of conveyance reserved "a right of way through the land for ingress, egress and regress, the said way to be of sufficient width and good grade for the passage of vehicles and persons." Subsequently, O'Leary conveyed the land to Eureka Land Company reserving the reserved right-of-way. Eureka Land Company acquired the property with the purpose of subdividing

it into residential lots. Eureka Land Company's plan of development ignored the right-of-way and provided a new and different route to be used by the owners of the easement. Id. at 507-08, 89 S.E. at 969.

Eureka Land Company argued that there had never been any location of the right-of-way provided for in the deeds and that it had the right to locate the right-of-way subject only to the restriction that the right-of-way be of good grade and of sufficient width. Rejecting Eureka Land Company's contention, we held, "[w]hen a way is once located it cannot be changed by either party without the consent of the other." Id. at 509, 89 S.E. at 970. See also Wagoner v. Jack's Creek Coal Corp., 199 Va. 741, 746, 101 S.E.2d 627, 630 (1958).

Neither Wexford Associates, the lot owners, nor the Atkissons could have changed the location of the easement that transverses the Park Authority's land without the Park Authority's consent. Likewise, we do no believe that the chancellor has the authority to interfere with the Park Authority's property rights by relocating the express easement on land owned by the Park Authority that was never burdened by the easement. Therefore, we hold that the chancellor did not have the authority to interfere with the Park Authority's property interest in land that was not encumbered by the express easement. [1]

III.

We will remand this proceeding to the chancellor with the following directions. The chancellor is directed to enter an order requiring that the lot owners and Wexford Associates

[1] Wexford Associates and the lot owners argue that at trial the Park Authority agreed to provide a new easement and that the Park Authority may not retract its purported consent. Our review of the record reveals that, at best, the Park Authority offered to provide the Atkissons permissive access to the cemetery. Wexford Associates and the individual lot owners also argue that "[the Park Authority's] appendix does not contain sufficient material to be considered by [this Court]." We find no merit in this argument.

provide an easement at their expense for the Atkissons, if the lot owners, Wexford Associates, and the Atkissons can agree upon a location and description of the new easement. In the event the litigants are unable to agree, then the chancellor is directed to order that Wexford Associates and the lot owners remove any obstructions that interfere with the Atkissons' use of the express easement.[2] See Lindsey v. Clark, 193 Va. 522, 527, 69 S.E.2d 342, 345 (1952).

Affirmed in part, reversed in part, and remanded.

---

[2]The Park Authority has represented to this Court that it has not obstructed that portion of the easement that transverses its property. Assuming the Park Authority has made no such obstructions, then the Atkissons would not be entitled to any relief against it.

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON	)	
and	)	
CARLOTTA T. ATKISSON,	)	
Plaintiffs,	)	
	)	
v.	)	CHANCERY NO. 97823
	)	
WEXFORD ASSOCIATES, INC.	)	
and	)	
FAIRFAX COUNTY PARK	)	
AUTHORITY, et al.,	)	
Defendants.	)	

FINAL ORDER

THIS MATTER CAME ON TO BE HEARD upon the Complaint of the plaintiffs, George Atkisson and Carlotta T. Atkisson, and upon the trial of this matter during which time plaintiffs presented evidence and then nonsuited as to defendants Michael A. Daniels, Bonnie L. Daniels, John Whitacre, Genevieve Whitacre, Donald D. Hall, Joan P. Hall, Patrick M. Byrne, Karen A. Byrne, Jack A. Winters, Bernadette Winters, Michael A. Perry, Jean D. Perry, Thomas G. Morr, Karen T. Morr, Dale A. Moss, Kathleen S. Moss, John F. Karaszewski, Lynn S. Karaszewski, Keith F. Higginbotham, Wendy J. Higginbotham, Justin A. Holmes, Claudia J. Holmes, James A. Evans, Jacquelyn F. Evans, Thomas A. Shoemaker, Joan C. Shoemaker, James S. Hooker, Maureen A. Hooker,

Larry D. Cordell, Gale M. Cordell, Donald C. Minoque, Susan A. Minoque, Raymond C. Cavanaugh, Eileen B. Cavanaugh, Michael R. Waller, and Diane U. Waller, and Wexford Associates, Inc., in its capacity as lot owner only, for lots number 12, 13, 14, 15 and 17. The defendants then presented their evidence, following which this Court determined that plaintiffs owned an easement through the real property of defendants by way of an express easement and an easement by prescription. The Court determined that this easement is located across the affected properties in accordance with the express grant contained in the Deed of 1892 located in Fairfax County Land Records at Deed Book P-5, Page 361. A view of the easement was taken by the parties and the Court, following which a letter opinion dated July 15, 1992, herein incorporated by reference, was issued by this Court wherein this Court requested that a subsequent hearing be held on the issues of the monetary value of the easement and alternative easements. At that hearing, the plaintiffs and defendants submitted evidence on the issue of damages, and the Court issued a letter opinion dated February 9, 1993, which is hereby incorporated by reference, wherein the Court ordered the following:

1. Each homeowner whose house blocked the plaintiffs' easement shall pay nominal damages to the plaintiffs of One Hundred Dollars ($100.00) per homeowner;

2. The Fairfax County Park Authority is to provide an easement to the plaintiffs for access to the cemetery of the plaintiffs that is accessible by an ordinary motor vehicle; and

3. The defendant, Wexford Associates, Inc., oppressively or maliciously, interfered with the plaintiffs' easement and therefore shall pay punitive damages in the amount of Ten Thousand Dollars ($10,000.00) to the plaintiffs, George Atkisson and Carlotta T. Atkisson; and therefore, it is

ADJUDGED, ORDERED AND DECREED that the plaintiffs' Motion for Nonsuit as to defendants Michael A. Daniels, Bonnie L. Daniels, John Whitacre, GenevieveWhitacre,

Donald D. Hall, Joan P. Hall, Patrick M. Byrne, Karen A. Byrne, Jack A. Winters, Bernadette Winters, Michael A. Perry, Jean D. Perry, Thomas G. Morr, Karen T. Morr, Dale A. Moss, Kathleen S. Moss, John F. Karaszewski, Lynn S. Karaszewski, Keith F. Higginbotham, Wendy J. Higginbotham, Justin A. Holmes, Claudia J. Holmes, James A. Evans, Jacquelyn F. Evans, Thomas A. Shoemaker, Joan C. Shoemaker, James S. Hooker, Maureen A. Hooker, Larry D. Cordell, Gale M. Cordell, Donald C. Minoque, Susan A. Minoque, Raymond C. Cavanaugh, Eileen B. Cavanaugh, Michael R. Waller, and Diane U. Waller, and Wexford Associates, Inc., in its capacity as lot owner only, for lots number 12, 13, 14, 15 and 17, is hereby granted.

ADJUDGED, ORDERED AND DECREED that the plaintiffs, George Atkisson and Carlotta T. Atkisson, are the owners of an easement by express grant and by prescription and is located across the affected properties in accordance with the express grant contained in the Deed of 1892 located in the Fairfax County Land Records at Deed Book P-5, Page 361; and, it is further

ADJUDGED, ORDERED AND DECREED that each defendant whose residential dwelling blocks the easement of the plaintiffs shall pay to the plaintiffs One Hundred Dollars ($100.00); and, it is further

ADJUDGED, ORDERED AND DECREED that defendant Fairfax County Park Authority shall, at is own expense, provide an easement across Fairfax County Park Authority land to allow access by the plaintiffs to the cemetery of the plaintiffs. This easement shall be accessible by an ordinary motor vehicle; and, it is further

ADJUDGED, ORDERED AND DECREED that defendant Wexford Associates., Inc., shall pay to plaintiffs, George Atkisson and Carlotta T. Atkisson, punitive damages in the amount of Ten Thousand Dollars ($10,000.00); and, it is further

ADJUDGED, ORDERED AND DECREED that the names of all interested parties, as found in the recorded lis pendens pertaining to the captioned case, a copy of the first page of which is attached, be, and hereby is, listed and provided to the Clerk of this Court and the Clerk shall not record the Order or make the entry until after the expiration of the time in which such appeal or writ of error may be applied for, or if applied for, after refusal thereof, or if granted, after final judgment or decree is entered by the appellate court.

ENTERED this 10th day of March, 1993.

(signed)

THOMAS A. FORTKORT, Judge

SEEN AND OBJECTED TO:
On the grounds that this Court did not award adequate compensatory damages and should not award nominal damages, that the punitive damages are insufficient and that the proper relief is the reestablishment of easement of plaintiff at the expense of defendants, including compensatory and punitive damages, costs and attorney's fees.

ANDERSON & CORRIE

(signed)

By: _____

SCOTT E. SNYDER, VSB #26233
12450 Fair Lakes Circle, #370
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs

SEEN AND OBJECTED TO:

DAVID P. BOBZIEN
COUNTY ATTORNEY

(signed)

By: _____

RUTH SOULIER
Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035
(703) 324-2421
Counsel for Defendant Fairfax
County Park Authority

SEEN AND OBJECTED TO:
On the grounds that this Court should not have found an express easement or prescriptive easement in favor of plaintiffs and should not have awarded nominal damages or punitive damages to plaintiffs and should have dismissed the case for lack of necessary parties and additionally

objects on the grounds set forth in Fairfax County Park Authority's Addendum to Final Order.

(signed)

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Counsel for Defendants
Wexford Associates, Inc.
and Individual Lot Owners

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON	)
and	)
CARLOTTA T. ATKISSON,	)
Plaintiffs,	)
	)
v.	)CHANCERY NO. 97823
	)
WEXFORD ASSOCIATES, INC.	)
and	)
FAIRFAX COUNTY PARK	)
AUTHORITY, et al.,	)
Defendants.	)

ADDENDUM TO FINAL ORDER

COMES NOW the Fairfax County Park Authority (hereinafter "Park Authority"), by and through counsel, and submits this its List of Exceptions to the rulings of this Honorable Court:

SEEN AND OBJECTED TO FOR THE FOLLOWING REASONS:

1. The Court's ruling erroneously concludes that Plaintiffs have an express easement.

2. The Court's ruling erroneously relies on Preshlock v. Brenner, 234 Va. 407, 362 S.E.2d 696 (1987), to conclude that Plaintiffs have a prescriptive easement.

3. The Court's ruling erroneously relies on Conrad v. Strickler, 215 Va. 454, 211 S.E.2d 248 (1975), and Lindsey v. Clark, 193 Va. 522, 69 S.E.2d 342 (1952), to conclude that an alternate easement must be provided by Defendant Park Authority.

4. The Court's ruling erroneously awards punitive damages after the Court previously struck the punitive damage count during the Motion to Strike at the conclusion of Plaintiffs' case. (July 31, 1991 Tr. at 172-174, 200.)

5. Defendant Park Authority further notes and preserves all of the additional arguments it has made to the Court, both orally and in writing, relative to the issues decided in this Final Order.

DAVID P. BOBZIEN
COUNTY ATTORNEY

(signed)

By: _____

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NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
Fairfax County Judicial Center
4110 Chain Bridge Road
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July 15, 1992

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Re: Atkisson v. Wexford Associates, Inc.
Chancery No. 97823

Dear Counsel:

This case is before the Court on counsel's motions for entry of the final decree and for a ruling that defendants should be required to reestablish the easement at their expense. At

trial in August 1991, the Court recognized the plaintiffs' easement as established both by express grant and by prescription. The Court reserved ruling at that time on the question of whether the defendants should be ordered to clear the obstructions which prohibit access to the easement.

After hearing counsel's arguments on the matter and visiting the site of the easement, the Court took under advisement the question of whether the defendants must remove all obstructions from the course of the easement. Virginia law provides three remedies in this situation: (1) defendants must remove obstructions to the easement at their expense, Pettus v. Keeling, 232 Va. 483, 352 S.E.2d 321 (1987), Walters v. Smith, 186 Va. 159, 41 S.E.2d 617 (1947); (2) defendants must pay plaintiffs the money value of the easement, Dillingham v. Hall, 235 Va. 1, 365 S.E.2d 738 (1988); or (3) defendants must provide an alternate easement, Conrad v. Strickler, 215 Va. 454, 211 S.E.2d 248 (1975), Lindsey v. Clark, 193 Va. 522, 69 S.E.2d 342 (1952).

The Court has no evidence before it as to the money value of the easement. Possible alternative easements have been discussed but not presented as a remedy. The Court requests counsel to schedule an evidentiary hearing to establish the money value of the easement and alternative easements. The Court's on-site view of the easement makes the conclusion inescapable that removal of obstructions is not a viable remedy.

Very truly yours,

(signed)

Thomas A. Fortkort

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
Fairfax County Judicial Center
4110 Chain Bridge Road
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February 9, 1993

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Re: Atkisson v. Wexford Associates
In Chancery No. 97823

Dear Counsel:

This case is before the Court on the issue of damages for obstruction of an easement. In a previous letter opinion, the Court ruled that he plaintiffs, George and Carlotta T. Atkisson, held both an express and prescriptive easement over property constituting the Wexford subdivision. That easement, which allows the plaintiffs access to a family burial ground, runs through the lots of several homeowners and County parkland.

This Court previously has ruled that removal of the easement obstructions would be grossly inequitable. These obstructions, improvements to the land, are valued at several million dollars. The easement itself provided no offsetting economic benefit to the easement holder, although the emotional impact of its loss might be substantial.

The Court directed the parties to submit evidence as to alternate easements and to the value of the easement that was obstructed. The plaintiffs presented evidence as to the value of the easement using a process similar to the method used by the Virginia Department of Transportation to evaluate road condemnation takings. The rationale underlying this approach is that since the easement is lost (due to the Court's earlier ruling), the loss is equivalent to the taking of land by the Commonwealth in a condemnation proceeding.

There are two problems with this approach. The first is that, unlike the instant case, the state takes land from the landowner in fee simple. An easement, however, is a limited property right since the holder retains only a right of access for a limited purpose. Thus, clearly an easement conceptually cannot have the same value as property in fee. The second problem with the plaintiff's approach is that it creates the same result that the Court previously has rejected. The valuation in a condemnation suit assumes that where the highway takes too much of the landowner's property, the entire parcel, with its improvements, is taken. Indeed, the plaintiff's expert places three properties in this category. Whether the improvements are torn down or the plaintiffs awarded damages equal to the total value of the properties, the economic loss to the defendant is the same. In the first instance, the improvements are removed and the owner is left with an unusable lot. In the second instance, the owner pays damages equal to the value of his lot

and the improvements thereon. In that event, if the numbers are accurate, the land owner is left with nothing, since his only recourse is to sell his property to cover the damages incurred. For the equitable reasons stated earlier, the Court will not grant this relief to the plaintiffs. The total valuation of the easement using the plaintiffs' method is over two million dollars. Awarding damages in this amount would be the functional equivalent of removing the structures.

There are three basic methods of ascertaining damages for obstruction of an easement. Kelly v. Ivler, 450 A.2d 817, 187 Conn. 31 (1982). Plaintiff must demonstrate "the diminution in value of their property . . . the cost of repairs to return the easement to this original state . . . or . . . the difference in the value of the easement just before the interferences and the value immediately after the obstruction was completed." Id. See also, Expressway Associates II v. Friendly Ice Cream Corp., 590 A.2d 431, 218 Conn. 474 (1991). Moreover, these damages must be proved with "reasonable certainty" under Virginia law. Dillingham v. Hall, 365 S.E.2d 739, 235 Va. 1 (1988). The award made by the trial court in Dillingham, one dollar per day for each day the defendant prevented access to the plaintiff's properties, was reversed by the Supreme Court as unsupported by the evidence. Id. Other states have been equally strict in requiring proof to substantiate the amount awarded. E.g., Kinzey v. Marlot, 432 A.2d 234, 288 Pa. Super. 426 (Superior Ct. of Pa., 1981) (striking award as based upon "a guess and highly conjectural").

The first two methods of ascertaining damages do not apply in this case. Diminution of property value obviously applies to property served by an easement. Landlocked property has little market value without the right of ingress and egress. In the instant case, plaintiffs' family cemetery is neither used nor capable of being used as a public burial place

and, thus, has no commercial value. Without commercial value, the cemetery has no market value. There is no evidence that this property would have any value to persons other than Mr. Atkisson and his kin, and no testimony has been offered to suggest that the property is suitable for an alternate use. Thus, the first method of valuation is unavailable to the plaintiffs.

The second method for measuring the value of an easement is calculating the cost of repairs to restore the easement to its original state. For reasons stated earlier in this letter, the Court will not entertain this method.

The third method of evaluation is the difference in the value of the easement just before he interference and the value immediately after the obstruction was completed. The postobstruction value in the instant case is zero. The obstruction was complete and defeated any possible use of the easement to access the cemetery. The value of the easement prior to the obstruction has not been ascertained. There is some evidence by defendant's experts that an easement is a restriction on the fee that it passes over. Its value, then, is the value to the landholder to have his property free of the nuisance of an easement. The defendant's expert opined that homeowners in the present case might pay up to five thousand dollars to remove this barrier to the full and free use of the land.

Although it is often very difficult, if not impossible, to establish compensatory damages with the requisite degree of certainty, the Court notes that most jurisdictions allow an award of nominal damages for interference with a valid easement. E.g., Clark v. Aqua Terra Corp., 133 Vt. 54, 329 A.2d 666 (1974); Sparks v. Scottsdale Mortgage Corp., 1 Ariz. App. 8 398 P.2d 916 (1965); Patalano v. Chabot, 139 Conn. 356, 94

A.2d 15 (1952). The awarding of nominal damages is predicated on the theory that some damage must be presumed "in order for plaintiff to vindicate his right." Griffith v. Nielsen, 141 Vt. 423, 449 A.2d 965, 968 (1982) (citations omitted). In accordance with this theory, the Court will order payment of nominal damages to the plaintiffs in the instant case. The homeowners whose buildings encroach upon the plaintiffs' easement are to pay one hundred dollars ($100.00) to the plaintiffs for each lot through which the easement passes.

In addition to the nominal damages to be paid by the homeowners, this Court will also exercise its equity jurisdiction to provide the plaintiffs with a substitute for the easement which has been obstructed. The Court will direct the Fairfax County Park Authority to provide a new easement allowing access to the cemetery. This easement is to be graded such that it is useable by an ordinary motor vehicle.

Finally, this Court notes that "punitive damages may be awarded for the interference with an easement whenever it is shown that defendant has acted in an oppressive or malicious manner . . . ." 28 C.J.S. Easement § 114. In the opinion of the Court, the evidence in the instant case demonstrates that defendant Wexford did in fact act in such a manner that warrants an award of punitive damages. The Court therefore awards plaintiffs ten thousand dollars ($10,000.00) in punitive damages.

Counsel for the plaintiffs will please prepare an order on the basis of this letter opinion, forward it to opposing counsel for endorsement as to form, and forward it to this Court for entry.

Very truly yours,
(signed)
Thomas A. Fortkort

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 1st day of August, 1994.

Fairfax County Park Authority, Appellant,

against Record No. 930819
Circuit Court No. C-97823

George Atkisson, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of appellees Wexford Associates, Inc., and Individual Defendants to set aside the judgment rendered herein on the 10th day of June, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach, Clerk

By: (signed)

Deputy Clerk

APPENDIX D

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 29th day of September, 1994.

Fairfax County Park Authority, Appellant,

against Record No. 930819
Circuit Court No. C-97823

George Atkisson, et al., Appellees.

ORDER DEFERRING ISSUANCE OF MANDATE

On August 17, 1994 came appellees Wexford Associates, Inc., et al., by counsel, and filed a motion to defer issuance of the mandate in this case.

Thereupon came the appellant and appellees George and Carlotta Atkisson, by counsel, and filed responses in opposition to said motion.

On consideration whereof, it is ordered that issuance of the mandate entered in this case be and the same hereby is deferred, to and including the 31st day of October, 1994, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance of the mandate shall be deferred until the final determination of the case by that Court.

A Copy,
Teste:
(signed)

Clerk

APPENDIX E

VIRGINIA LAWYERS PRACTICE HANDBOOK

APPELLATE PRACTICE

VIRGINIA AND FEDERAL COURTS

Published by

COMMITTEE ON CONTINUING LEGAL EDUCATION

of the

VIRGINIA LAW FOUNDATION

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AUTHORS

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CHAPTER SEVEN - HONORABLE GEORGE M. COCHRAN
Supreme Court of Virginia
Richmond

HONORABLE HARRISON L. WINTER
United States Court of Appeals, Fourth Circuit
Baltimore

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E. Petition for Rehearing.

Petitions for rehearing may also be filed by the losing lawyer after the appeal has been granted and argued and an opinion unfavorable to his client has been delivered by our Court. Absent an egregious error, however, and we find it very difficult to acknowledge even the possibility of such a flaw, his chances of success are infinitesimal.